

No. 78-409

Supreme Court, U. S.

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MICHAEL A. DAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

WINFRED DAN VALLANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671, seeking damages for injuries allegedly resulting from negligent treatment by Navy doctors while petitioner was on active duty. The district court entered summary judgment against petitioner under *Feres v. United States*, 340 U.S. 135 (1950), which held that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen that "arise out

of or are in the course of activity incident to service" (*id.* at 146). The court of appeals affirmed (Pet. App. 17-19).

Further review is unwarranted. Contrary to petitioner's contention (Pet. 3, 5), the *Feres* case has not been undermined by subsequent decisions, and it should not be overruled. This Court recently reaffirmed the doctrine established by *Feres* in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).¹ In *Stencel Aero* the Court recognized that the reasons supporting the *Feres* decision, "[t]he peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline * * *" continue to have force and support the rule that servicemen injured by the negligence of military personnel while on active duty may not sue under the Federal Tort Claims Act. *Id.* at 671-672, quoting from *United States v. Brown*, 348 U.S. 110, 112 (1954). See also *Feres v. United States, supra*, 340 U.S. at 145.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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¹ The cases on which petitioner relies (Pet. 5 n.5) all pre-date *Stencel Aero*.